

**STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND**

In the Matter of Protest of:

Heritage Community Services

Department of Social Services  
IFB No 5400004813  
Teen Pregnancy Services

**BEFORE THE CHIEF PROCUREMENT OFFICER**

**DECISION**

CASE NO.: 2012-146

POSTING DATE: December 27, 2012

MAILING DATE: December 27, 2012

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest dated October 22, 2012, from Heritage Community Services (Heritage). With this request for proposals (RFP) the South Carolina Department of Social Services (DSS) attempts to procure services for Teen Pregnancy Prevention - Abstinence. After evaluating the proposals received, DSS posted a notice of intent to award to South Carolina Parents Involved in Education (SCPIE). Heritage protested the award, alleging that SCPIE was nonresponsive to the requirements of the RFP as well as incorrect/unfair scoring by the DSS evaluators.

In order to resolve the matter, the CPO conducted a hearing December 12 and 13, 2012. Appearing before the CPO, were Heritage, represented by P. Brandt Shelbourne, Esq.; SCPIE, represented by Michael Montgomery, Esq.; and DSS, represented by Kathy Gettys, Esq.

**NATURE OF PROTEST**

The letter of protest is attached and incorporated herein by reference.

**FINDINGS OF FACT**

The following dates are relevant to the protest:

1. On August 28, 2012, DSS issued RFP No. 5400004813. (Ex. 2)<sup>1</sup>
2. On September 5, 2012, DSS issued Amendment 1 to the RFP. (Ex. 3) It extended the proposal deadline from September 5 to September 26, 2012. The amendment is of no consequence to the protest.
3. On September 19, 2012, DSS issued Amendment 2 to the RFP answering questions submitted by prospective offerors. (Ex. 4) According to the parties, Amendment 2 did not give rise to the grounds of protest.
4. On October 10, 2012, DSS posted its Intent to Award the RFP to SCPIE for \$546,972. (Ex. 8)
5. On October 22, 2012, Heritage filed its protest by email to the Protest-MMO address. The protest was timely filed.
6. On October 23, 2012, DSS suspended the Intent to Award. (Ex. 9)

## **DISCUSSION**

DSS processed its solicitation for Teen Pregnancy Prevention – Abstinence - in response to a directive from the SC General Assembly. Proviso 26.21 of the 2012-2013 General Appropriations Bill, Act No. 288, Part IB, § 26.21 (2012). The portions of the proviso relevant to this procurement and protest are as follows:

(2)(a) One contract must be awarded to an entity that uses a National Abstinence Clearinghouse (NAC) approved curricula for a minimum of one year prior to their application. NAC is the agency the federal Department of Health and Human Services has chosen to provide a comprehensive, national list of approved abstinence-only education curricula that is consistent with the A through H legislative requirements defined in Title V, Section 510(b)(2). Any entity that is awarded one of the above contracts must agree to provide data to verify the program effectiveness.

---

<sup>1</sup> At the beginning of the hearing counsel for Heritage offered as an exhibit a panel instruction page signed by one of the evaluators. The CPO marked this as Exhibit 1. To avoid confusion, the CPO later asked the procurement officer to introduce documents from the procurement file, including the evaluation and scoring papers. Those papers were marked collectively as Exhibit 7. The document marked as Exhibit 1 appears as the third page of Exhibit 7. The CPO reminds parties to a hearing of this language from the pamphlet distributed with the notice of hearing:

The responsible procurement office ... introduces key documents from the procurement file, including the solicitation, any relevant responses, and a chronology of significant events. After marking these exhibits, the CPO hears motions....

(b) The contract awarded pursuant to this item must be awarded to entities that utilize a program or evaluation process approved by, and under the supervision of, a federally approved Institutional Review Board (IRB) and have been evaluated and approved for medical accuracy by the United States Health and Human Services' Office of Adolescent Health or the Office of Adolescent Pregnancy Prevention. Contracts may also be awarded to entities that do not meet these requirements on the date of the award but the entity must meet the requirements by the end of the fiscal year or the entity must forfeit the final quarterly payment.

DSS reiterated the requirements of the proviso in the RFP, writing, in relevant part:

### **III. SCOPE OF WORK/SPECIFICATIONS**

The South Carolina Department of Social Services (DSS) is seeking a vendor to provide a teen pregnancy prevention program that uses a National Abstinence Clearinghouse (NAC) approved curricula for a minimum of one year prior to their application. NAC is the agency the federal Department of Health and Human Services has chosen to provide a comprehensive, national list of approved abstinence-only education curricula that is consistent with the A through H legislative requirements defined in Title V, Section 510(b)(2).

- A. Offeror must utilize a program or evaluation process approved by, and under the supervision of, a federally approved Institutional Review Board (IRB) and have been evaluated and approved for medical accuracy by the United States Health and Human Services' Office of Adolescent Health or the Office of Adolescent Pregnancy Prevention.

A Contract may also be awarded to an Offeror that does not meet these requirements on the date of the award but the Offeror must meet the requirements by the end of the fiscal year or the Offeror must forfeit the final quarterly payment (last three monthly payments).

\*\*\*

- C. Offerors must include their implementation and process analysis using three data sources and including
  - a. A review of the program documents and records
  - b. Interviews and focus group results
  - c. Results of on-site program observation

(Ex. 2, p. 13)

Additionally, DSS wrote the following relevant to the above scope of work regarding what the offerors had to submit with their proposals:

#### **IV. INFORMATION FOR OFFERORS TO SUBMIT**

##### **INFORMATION FOR OFFERORS TO SUBMIT -- EVALUATION (JAN 2006)**

In addition to information requested elsewhere in this solicitation, Offerors should submit the following information for purposes of evaluation:  
[04-4005-1]

\*\*\*

(4) The extent to which a proven and public history of having effectively implemented abstinence programs in this State where participating students were at least thirty percent lower than comparable non-program students, utilizing the process analysis as detailed under Scope of Work Item C.

(5) Documentation showing that the program has federal Institutional Review Board (IRB) approval and is currently under IRB supervision. If Offeror does not have an approved IRB program they must provide documentation showing that they have applied for IRB approval and must provide documentation showing that the program has federal approval and is currently under IRB supervision prior to June 30, 2012 *[sic]*....

(Ex. 2, p. 15)

#### **MOTION TO DISMISS**

At the start of the hearing, SCPIE, joined by DSS, asked the CPO to dismiss a number of grounds asserted by Heritage arguing that:

- A. Heritage's Notice of Protest is so vague, verbose, and confusing as to fail to alert the parties to the general nature of the protest.
- B. Some, or all, of Heritage's protest and supplemental materials is untimely and was filed more than ten days after the notification of intent to award in violation of Section 11-35-4210.
- C. Heritage's Notice of Protest improperly criticizes and seeks to compare evaluations without any allegation of impropriety in the evaluation process.
- D. To the extent that Heritage seeks to assert that the SC PIE program fails to meet the "legislative standard", such a ground is a protest of the solicitation and is untimely.

During the hearing, the CPO ruled only on the timeliness issue. The Consolidated Procurement Code (Code) provides all bidders and offerors the privilege of filing a protest. S.C.

Code Ann. Section 11-35-4210(b) clearly delineates the time a party aggrieved in connection with an intended award shall file a protest. The time allowed is “within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code.” The Code allows a protestant to modify a timely filed protest: “At any time after filing a protest, but no later than fifteen days after the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code, a protestant may amend a protest that was first submitted within the time limits established by subsection (1)(b).”

DSS posted its notice of intent to award October 10, 2012. Ms. Anne Badgley, President of Heritage, filed its protest on October 22, 2012, which was within the filing period due to the tenth day falling on a weekend. The fifteenth day after the intent to award was October 25, 2012. Between October 26 and December 11, 2012, even after hiring legal representation, and without copying the other parties, Ms. Badgley continued to supplement her protest issues and documents creating a stack of documents over three inches high. Everything purporting to raise a new ground of protest filed after 5:00PM October 25, 2012 was untimely. Therefore, the CPO will consider only those grounds of protest raised in Ms. Badgley’s October 22, 2012, letter. All subsequently-filed protest grounds are dismissed.

All other assertions by SCPIE in its motion regarding dismissal of Heritage’s grounds of protest are denied. They are addressed below.

### **CONCLUSIONS OF LAW**

Heritage challenged the responsiveness of SCPIE’s proposal and DSS’s evaluation of the proposals received. These categories of protest are addressed separately, as follows.

#### **Responsiveness**

In its October 22 protest letter Heritage articulated four separate instances where SCPIE’s proposal was nonresponsive to the requirements of the RFP:

1. It failed to properly document approval of the SCPIE program by the National Abstinence Clearinghouse, or NAC;
2. Its claim that the federal Department of Health and Human Services had approved the program's medical accuracy was unsubstantiated;
3. It failed to adequately document SCPIE's program was effective; and
4. It failed to establish SCPIE's program had the approval and oversight of an accredited Institutional Review Board ("IRB").

Competitive sealed proposals are governed by Code Sections 11-35-1520 and 11-35-1530:

[A] contract may be entered into by competitive sealed proposals subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided in this section [11-35-1530].

S.C. Code Ann. § 11-35-1530(1) (2011). Section 11-35-1530(7) requires that, after evaluation, "all responsive offerors must be ranked from most advantageous to least advantageous to the State." Section 11-35-1530(9) provides that

[a]ward must be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the State, taking into consideration price and the evaluation factors set forth in the request for proposals....

Section 11-35-1520 requires that offerors be responsive in order to be eligible to receive a contract award. The Code defines a responsive bidder or offeror as "a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals." (§ 11-35-1410(7)) A protestant challenging the responsiveness of a competitor's proposal "has the burden of proving its claim by the weight or preponderance of the evidence." *Appeal by Blue Bird Corp.*, Panel Case No. 1994-15. Decisions by the procurement officer as to ranking of offerors and awarding a contract under an RFP are final unless clearly erroneous, arbitrary, capricious, or contrary to law. (§ 11-35-2410(A)) This standard applies to determinations whether an offeror is responsive and should be ranked. *See Appeal by Value*

*Options, et al.*, Panel Case No. 2001-7 (“[T]he Panel finds that the determination by [the procurement officer] that VO's bid is nonresponsive was not clearly erroneous, arbitrary, capricious, or contrary to law....”). To prevail on this part of its challenge, then, Heritage must prove by a preponderance of the evidence that the procurement officer's finding that SCPIE's proposal was responsive was clearly erroneous, arbitrary, capricious, or contrary to law.

1. In its first allegation that SCPIE's proposal was nonresponsive, Heritage wrote:

SC PIE's proposal should be deemed unresponsive for not providing the appropriate documentation, as required by the proviso,<sup>2</sup> for being a stand alone abstinence education curricula and further for a confusing presentation of undocumented data, possibly from a different program that is not NAC approved, to imply there is scientifically derived evidence that HIS is a proven-effective program.

Regarding NAC (National Abstinence Clearinghouse) approval, the RFP required:

The South Carolina Department of Social Services (DSS) is seeking a vendor to provide a teen pregnancy prevention program that uses a National Abstinence Clearinghouse (NAC) approved curricula for a minimum of one year prior to their application. NAC is the agency the federal Department of Health and Human Services has chosen to provide a comprehensive, national list of approved abstinence-only education curricula that is consistent with the A through H legislative requirements defined in Title V, Section 510(b)(2).

(Ex. 2, p. 13)

In its response to the RFP's requirement that its program be NAC approval, SCPIE wrote, “South Carolina Parents Involved in Education has utilized *Healthy Image of Sex* curricula throughout South Carolina since 2004. Health Image of Sex has been approved by the National Abstinence Clearinghouse (NAC) for adherence to federal A-H legislation requirements for abstinence education as set forth in Section 510(b) of Title V of the Social Security Act, as amended. This year, the Founder and President of NAC personally reviewed

---

<sup>2</sup> Heritage analyzed responsiveness in relation to the language of the Proviso. DHEC included that language verbatim in the RFP. The CPO interprets Heritage's reference to the proviso as if it referred to the RFP.

the HIS curriculum and she provided the following letter to document her personal and professional approval.” (Ex. 6, p. 9) A copy of the letter from Leslee J. Unruh was included with SCPIE’s proposal. The text of both SCPIE’s response and Ms. Unruh’s letter unequivocally state that the SCPIE program has earned NAC approval. Heritage offered no convincing evidence to the contrary.

2. In its second allegation that SCPIE’s proposal was nonresponsive, Heritage challenged this passage from the SCPIE proposal:

The *Healthy Image of Sex* curriculum proposed for this project was evaluated by the US Health and Human Services' Office of Adolescent Health for medical accuracy in 2008. As a result of this important review, curriculum authors were provided a list of statistics that required updating. These updates were made and the curriculum was revised in 2010 to meet the medical accuracy standards provided by the US Health and Human Services Office of Adolescent Health.

(Ex. 6, p. 10) Heritage wrote that:

The United States Office of Adolescent Health (OAH) confirmed that their office was established within the Office of the Assistant Secretary for Health in 2010. The OAH website also states that the office was founded in 2010. It is not possible for SCPIE’s curricula (Healthy Images of Sex) to be evaluated in 2008 by an office that did not exist until 2010.

\*\*\*

SC PIE’s proposal should be deemed unresponsive for not providing Medical Accuracy Approval and the SC PIE statement claiming medical accuracy appears to be unsubstantiated.

The RFP required, “Offeror must utilize a program or evaluation process ... evaluated and approved for medical accuracy by the United States Health and Human Services’ Office of Adolescent Health or the Office of Adolescent Pregnancy Prevention.” (Ex. 2, p. 13) Sheri Few acknowledged that the Office of Adolescent Health (OAH) did not exist until 2010. She argued, however, that statement was merely a misstatement. She testified that she did actually submit her program to the federal Department of Health and Human Services (HHS), but to another unit of



HHS, the Family Youth Services Bureau (FYSB), a predecessor of the OAH. SCPIE offered an organization chart for HHS (Ex. 13) that reflects that both OAH and FYSB are agencies within the Department. Other than Ms. Few's confusion between OAH and FYSB, Heritage offered no compelling evidence that HHS has not evaluated SCPIE's program and approved it for medical accuracy.

3. For its third responsiveness claim Heritage wrote:

There is insufficient and inconsistent evidence that the Healthy Image of Sex program met the legislative standard, "Entities that have a proven and public history of having implemented abstinence programs in this State may be given a preference during the contract evaluation and awarding process. For the purpose of this proviso, a program is 'effectively implemented' if the program has published positive behavioral outcomes by an independent and nationally recognized private or government agency demonstrating that a year after the program, program participants initiated sex at a rate of at least thirty percent lower than comparable non-program students."

SC PIE should be deemed unresponsive because they failed to properly document the foundational requirements of the Legislature that would ensure the program proposed has long-term significant positive behavioral outcomes for the targeted audience.

The language quoted in the first paragraph is taken from Section 26.21(D), the legislative proviso requiring the solicitation. Similar, though not identical, language appears in Part IV of the RFP.

Part III(C) of the RFP required:

Offerors must include their implementation and process analysis using three data sources and including

- a. A review of the program documents and records
- b. Interviews and focus group results
- c. Results of on-site program observation

(Ex. 2, p. 13) Further, under Part IV of the RFP, Information for Offerors to Submit, DSS wrote,

In addition to the information requested elsewhere in this solicitation, Offerors should submit the following information for purposes of evaluation:

\*\*\*

(4) The extent to which a proven and public history of having effectively implemented abstinence programs in this State where participating students were at least thirty percent lower than comparable non-program students, utilizing the process analysis as detailed under Scope of Work Item C.

(Ex. 2, p. 15)

SCPIE included with its proposal six and a half pages extolling its success in abstinence education since 2004, including its program documents and records, implementation and process analysis, data collection processes, pre- and post-surveys, fidelity to plan process, interviews and focus group results, results of on-site program observations, and staff observations. (Ex. 6, pp. 11–17) In a different section, SCPIE included three pages of data charts supporting the success of its program. (Ex. 6, pp. 33-35) Heritage offered no compelling evidence to the contrary.

4. In its fourth issue regarding SCPIE's responsiveness, Heritage quoted language from Part IV of the RFP, concerning Institutional Review Board approval, and argues that the IRB information SCPIE submitted is inadequate. Part III of the RFP required:

A. Offeror must utilize a program or evaluation process approved by, and under the supervision of, a federally approved Institutional Review Board (IRB) and have been evaluated and approved for medical accuracy by the United States Health and Human Services' Office of Adolescent Health or the Office of Adolescent Pregnancy Prevention.

A Contract may also be awarded to an Offeror that does not meet these requirements on the date of the award but the Offeror must meet the requirements by the end of the fiscal year or the Offeror must forfeit the final quarterly payment (last three monthly payments).

(Ex. 2, p. 13) Further, under Part IV of the RFP, Information for Offerors to Submit, DSS requested:

Documentation showing that the program has federal Institutional Review Board (IRB) approval and is currently under IRB supervision. If Offeror does not have an approved IRB program they must provide documentation showing that they have applied for IRB approval and must provide documentation

showing that the program has federal approval and is currently under IRB supervision prior to June 30, 2012.

(Ex. 2, p. 15)

SCPIE responded, “SCPIE’s program and evaluation process has been approved by, and is under supervision of a Federally-approved Institutional Review Board (IRB).” (Ex. 6, p.9) SCPIE included a letter from Guang Zhao, PhD, IRB Chair and Director of the Office of Public Health Statistics & Information Systems at the SC Department of Health and Environmental Control. The proposal describes SCPIE’s IRB approval, “The letter indicates that SC Parents Involved in Education’s program possesses a Federal Wide Assurance number: FWA00003803. Furthermore, the letter states that no further action or IRB oversight is required as long as the project remains the same.” Dr. Zhao’s letter was included with SCPIE’s proposal. (Ex. 6, p. 10) Because the copy in the proposal was difficult to read, the CPO accepted a full-size copy as an exhibit. (Ex. 10) In his letter, dated January 4, 2012, Dr. Zhao wrote, in part,

The DHEC IRB has reviewed the project entitled, “*A Statewide Program to Prevent Teen Pregnancy.*” It is the understanding of this IRB that the South Carolina Parents Involved In Education (SC PIE), a nonprofit organization governed by a Board of Directors, was funded by a DSS grant to implement this program in 2010<sup>3</sup> and will propose a similar project in 2011-2012, which will add an Evaluation Component. It is also the understanding of this IRB that DHEC Health Services’ Chronic Disease Epidemiology and evaluation will be contracted by SC PIE to provide the evaluation support.

\*\*\*

The DHEC IRB in its deliberation considered in this case, the purpose of this activity is to possess the success of an established program in achieving its objective and the information gained from the evaluation will be useful in providing feedback to improve that program. Furthermore, Federal policies that DHEC conducts its human subject research by are detailed in the “Ethical Principles and Guidelines for the Protection of Human Subjects of Research (the Belmont Report). The term “practice” in this report refers to interventions

---

<sup>3</sup> Actually, the DSS “grant” Dr. Zhao referenced was a contract awarded for the same or similar scope of service as this RFP.

designed solely to enhance the wellbeing of an individual or groups of individuals. The conduct of the SC PIE Statewide Teen Prevention program will do just that. Such interventions need not be reviewed as research. **Based on this and 45 CFR 46.102(d), the DHEC IRB considers this activity as Public Health Practice and is not considered human subjects research.** No further action or IRB oversight is required, as long as the project remains the same.

Please reference the Protocol number, **IRB.12-001**, assigned to this project when making any contact with this office regarding this project.

(Ex. 10 (emphasis in original))

Heritage first argues that SCPIE does not possess a Federal Wide Assurance number; that the number in the letter actually belongs to DHEC. SCPIE agrees, inasmuch as it is engaging DHEC for evaluation support via a subcontract.

Second, Heritage argues that SCPIE's program is not currently under IRB supervision, noting Dr. Zhao's statement that "No further action or IRB oversight is required, as long as the project remains the same." SCPIE responded that the mere fact that Dr. Zhao has authorized SCPIE to operate in accordance with the program DHEC approved does not indicate any deficiency in its program. The CPO agrees. Licensing and certification authorities typically authorize their licensees and certified entities to operate independently according to their license or certification requirements, rules, policies, practices and protocol.<sup>4</sup>

Finally, Heritage questions when the SCPIE program was required to obtain IRB approval. In Part III the RFP required "the Offeror must meet the requirements by the end of the fiscal year." The State's fiscal year will end on June 30, 2013. Unfortunately, DSS confused the matter by writing in Part IV, "If Offeror does not have an approved IRB program they must

---

<sup>4</sup> In fact, Heritage's own proposal reads similarly. In a letter from Thomas E. Smith, PhD, Chair, Institutional Review Board, of the National Abstinence Education Association, included by Heritage with its proposal, Dr. Smith wrote, "This letter serves as documentation that the IRB Submission dated (6/30/11) from Heritage Community Services, Inc. (FWA00012159) has received approval for one year. Any significant changes in the program curriculum or its evaluation must be reported to this board to sustain its approval." (Ex. 5, p. 3)

provide documentation showing that they have applied for IRB approval and must provide documentation showing that the program has federal approval and is currently under IRB supervision prior to June 30, 2012.” The date in the latter passage is, of course, prior to the solicitation’s issue date. The CPO finds this ambiguity must be resolved by reference to Part III, Scope of Work/Specifications.<sup>5</sup>

### **Conclusion – Responsiveness**

As stated above, the protestant must prove by a preponderance of the evidence that the procurement officer’s determination of responsiveness was clearly erroneous, arbitrary, capricious, or contrary to law. Heritage failed to meet its burden of proof in this case. Therefore, the protests regarding SCPIE’s responsiveness are denied.

### **The Evaluation**

Heritage alleged also that the DSS evaluation of the proposals was flawed, writing:

Incorrect/unfair scoring by DSS Evaluators on the Heritage scores for counties served within the state, seen on the Evaluator Explanation Summary (no. 4) and the Evaluators Score Sheet (no. 4). Both vendors stated that they would serve 46 counties.

As remedy, Heritage requested that its proposal should be given a perfect score of 20 points on the Evaluator Score Sheet.

Heritage argued that the evaluators penalized it during the evaluation due to their misinterpretation of Heritage’s proposal. In its proposal, Heritage included a chart entitled “Number/Names of Counties in the State Where Services are Provided.” (Ex. 5, p. 24) According to the chart, Heritage offered three of its four services (Faith/Community Leadership, Pro Parents and Foster Parent Services receiving parent series; Teens impacted through parent series; and

---

<sup>5</sup> The CPO cautions DSS against inserting specific requirements in Part IV, Information for the Offerors to Submit, which could be interpreted differently than Part III, Scope of Work.

Community and SCHFF members engaged) in all forty-six counties of the state. However, Heritage offered its fourth service, A-H Consistent Heritage Keepers to Adolescents, in only twenty-five counties. (Ex. 5, p. 24)

Three DSS evaluators scored the proposals. All three, Kay Shugert, Corita Loyd, and Brad Leake, appeared at the hearing and testified regarding their evaluations. All of them acknowledged that Heritage's chart influenced their scoring of its proposal. However, each one stated that he/she followed instructions, evaluated the proposals fairly and independently, and that no one influenced the scoring. The three evaluators determined SCPIE's proposal most advantageous to the state.

Heritage argues the evaluators misinterpreted its proposal. It blames them for misreading the chart on page 24. Heritage, not the evaluators, is responsible for the clarity of its proposal. Heritage asserts that it should have received a perfect score of 20 points for evaluation criterion 3, "Number of counties in the State where services will be provided." In doing so, Heritage asks the CPO to ignore the scores of the evaluators and rescore its proposal.

Regarding award of a RFP, the Consolidated Procurement Code reads, "Award must be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the State, taking into consideration price and the evaluation factors set forth in the request for proposals." (§ 11-35-1530(9)) Once the evaluation is completed, the Code gives great deference to the evaluators' determination of award. Regarding the evaluation and determination of award of a RFP, the Code also reads, "The determinations required by the following sections and related regulations are final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law: ...Section 11-35-1530(7) (Competitive Sealed

Proposals, Selection and Ranking of prospective Offerors), Section 11-35-1530(9) (Competitive Sealed Proposals Award)....” (§ 11-35-2410)

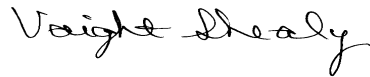
On numerous occasions, the Panel has held that it will not re-evaluate proposals and will not substitute its judgment for the judgment of the evaluators, who are often experts in their fields, or disturb their findings so long as they follow the requirements of the Code and the RFP, fairly consider all proposals and are not actually biased. *See, e.g., Protest of Santee Wateree Regional Transportation Authority*, Panel Case No. 2000-5 (reaffirming that the evaluation process need not be perfect as long as it’s fair and the Panel will not re-evaluate proposals); *Protest of Transportation Management Services, Inc.*, Panel Case No. 2000-3 (finding that the evaluation process is not required to be perfect and that the Panel will not re-evaluate proposals); *Protest of First Sun EAP Alliance*, Panel Case No. 1994-11 (noting that the Panel will not disturb the evaluators’ findings so long as they following the Code and the RFP’s requirements, fairly consider all proposals and are not actually biased); *Protest of Volume Services*, Panel Case No. 1994-8 (holding that the Panel will not substitute its judgment for that of the evaluators). In the *Santee Wateree* case, *ante*, the Panel also explained that subjectivity is the hallmark of the RFP process and does not equate with arbitrariness. Moreover, the Panel has found that “the variation of evaluators’ scores alone is only proof of the subjective nature of the evaluation aspect of the RFP process.” *Protest of Travelsigns*, Panel Case No. 1995-8. Regardless, the protestant bears the burden of proof to demonstrate by a preponderance of the evidence that the evaluators’ determinations were flawed. *Id.* Heritage has failed to meet that burden and its protest of the evaluation is therefore denied.<sup>6</sup>

---

<sup>6</sup> Heritage also alleged that SCPIE copied parts of its proposal from older Heritage proposals. At the hearing, Heritage offered neither evidence nor argument regarding this protest ground. Therefore, it is denied as abandoned.

## DETERMINATION

For the foregoing reasons the protest is denied.



---

R. Voight Shealy  
Chief Procurement Officer  
For Supplies and Services

---

December 27, 2012

Date

Columbia, S.C.



## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

*Protest Appeal Notice (Revised July 2012)*

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

-----  
Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2012 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. The Request for Filing Fee Waiver form is attached to this Decision. If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, an incorporated business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

**South Carolina Procurement Review Panel  
Request for Filing Fee Waiver  
1105 Pendleton Street, Suite 202, Columbia, SC 29201**

---

\_\_\_\_\_  
Name of Requestor

\_\_\_\_\_  
Address

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip

\_\_\_\_\_  
Business Phone

- 
1. What is your/your company's monthly income? \_\_\_\_\_
  2. What are your/your company's monthly expenses? \_\_\_\_\_
  3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this  
\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_

\_\_\_\_\_  
Notary Public of South Carolina

\_\_\_\_\_  
Requestor/Appellant

My Commission expires: \_\_\_\_\_

---

For official use only: \_\_\_\_\_ Fee Waived \_\_\_\_\_ Waiver Denied

\_\_\_\_\_  
Chairman or Vice Chairman, SC Procurement Review Panel

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_  
Columbia, South Carolina

**NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.**



October 22, 2012

Chief Procurement Officer  
Materials Management Office  
1201 Main Street, Suite 600  
Columbia SC 29201

RE: Protest of Notice of Intent to Award Teen Pregnancy Services-Abstinence  
Contract No. 4400005773  
Solicitation No. 5400004813

Dear Chief Procurement Officer:

Heritage Community Services (Heritage) pursuant to SC code 11-35-430, hereby protests the Notice of Award for the above referenced contract to SC Parents Involved in Education (SCPIE). The grounds for this protest are as follows:

*1. Program Description including verification that it uses a NAC approved curricula for a minimum of one year prior to the proposal submission;*

*The South Carolina Department of Social Services (DSS) is seeking a vendor to provide a teen pregnancy prevention program that uses a National Abstinence Clearinghouse (NAC) approved curricula for a minimum of one year prior to their application. NAC is the agency the federal Department of Health and Human Services has chosen to provide a comprehensive, national list of approved abstinence-only education curricula that is consistent with the A through H legislative requirements defined in Title V, Section 519 (b) (2).*

The standards set in the legislation governing the Teen Pregnancy Prevention funds were painstakingly negotiated between legislators and DSS. These standards were set for the purpose of using the state's scarce funds effectively, to guarantee to the best of the state's ability that the funds would be used to deliver a proven effective, NAC program. Throughout the document submitted by SCPIE there are references to two curricula – Worth the Wait, a program developed by a physician at Scott and White (not NAC approved), and Healthy Image of Sex (HIS), a program developed by Ms Few and Ms Jones. The purpose of the legislation is to provide clear standards for the use of the funds, that they will be used to deliver a proven effective program. The intertwining of documentations, letters and proclaimed outcomes for Worth the Wait, which does not meet the NAC approval requirement of this proviso, seems to be positioned to make the evaluators believe that HIS can somehow be recognized as a stand alone proven-effective abstinence education program meeting the requirements of the proviso, when in fact it does not.

Exhibit: B, D

Remedy: SCPIE's proposal should be deemed unresponsive for not providing the appropriate documentation, as required by the proviso, for being a stand alone abstinence education curricula and further for a confusing presentation of undocumented data, possibly from a different program that is not NAC approved, to imply there is scientifically derived evidence that HIS is a proven-effective program

A. Offerer must

- utilize a program or evaluation process approved by and under the supervision of a federally approved Institutional Review Board (IRB).

SC PIE provides a letter from SC DHEC actually stating that the program and evaluation process they are proposing is NOT under the supervision of an IRB, the opposite of what is required by the legislation. (see more under #5)

- *and have been evaluated and approved for medical accuracy by the United States Health and Human Services' Office of Adolescent Health or the Office of Adolescent Pregnancy Prevention.* SCPIE's response was as follows, from (p.10) SCPIE bid:

**A. [CONTINUED] OFFEROR MUST... HAVE BEEN EVALUATED AND APPROVED FOR MEDICAL ACCURACY BY THE UNITED STATES HEALTH AND HUMAN SERVICES OFFICE OF ADOLESCENT HEALTH OR THE OFFICE OF ADOLESCENT PREGNANCY PREVENTION.**

"The *Healthy Image of Sex* curriculum proposed for this project was evaluated by the US Health and Human Services' Office of Adolescent Health for medical accuracy in 2008. As a result of this important review, curriculum authors were provided a list of statistics that required updating. These updates were made and the curriculum was revised in 2010 to meet the medical accuracy standards provided by the US Health and Human Services Office of Adolescent Health."

The United States Office of Adolescent Health (OAH) confirmed that their office was established within the Office of the Assistant Secretary for Health in 2010. The OAH website also states that the office was founded in 2010. It is not possible for SCPIE's curricula (*Healthy Images of Sex*) to be evaluated in 2008 by an office that did not exist until 2010.

Furthermore, the United States Office of Adolescent Health (OAH) confirmed that their office only conducts Medical Accuracy reviews for the curricula on their evidence based list, the SCPIE curricula (*Healthy Images of Sex*) is not on this list.

Exhibit: B, C

Remedy: SC PIE's proposal should be deemed unresponsive for not providing Medical Accuracy Approval and the SC PIE statement claiming medical accuracy appears to be unsubstantiated.

- C. *Offerer must include their implementation and process analysis using three data sources and including a. A review of the program documents and records b. Interviews and focus group results c. Results of on-site program observation*

Portions of the SC PIE application were taken word for word from Heritage Community Services 2011 application without permission and without appropriate credit. Further, in some portions where SC PIE literally has copied a sentence describing Heritage's in-house capacity, SC PIE then contradicts itself saying it out-sources those same processes.

Exhibit: B, G

Remedy: Contradictions, inconsistencies and copying from another's work without permission or proper credits should be taken into account when considering the capacity of an agency to fulfill contractual obligations and the substantial amount of state funding under consideration.

**3. Number/name of counties in the state where services are provided.**

Incorrect/unfair scoring by DSS Evaluators on the Heritage scores for counties served within the state, seen on the Evaluator Explanation Summary (no. 4) and the Evaluators Score Sheet (no. 4). Both vendors stated that they would serve 46 counties, the solicitation stated:

(p.15) IV. INFORMATION FOR OFFERORS TO SUBMIT, INFORMATION FOR OFFERORS TO SUBMIT -- EVALUATION (JAN 2006). (3) Number/names of counties in the state where services are

provided

(p.17) EVALUATION FACTORS -- PROPOSALS (SCDSS 2012). 4) Number of counties in the State where services will be provided (20 points)

Heritage was scored incorrectly because the evaluators misinterpreted that Heritage will only serve 25 counties. However, if Heritage is to be evaluated by the same standards of service that SC PIE was given full credit by the evaluators, Heritage also should be given the maximum score of 20 points, per evaluator. Our reasoning is as follows: for all 46 counties, SC PIE will offer a training to the faith community at one time and two African American churches in each county will participate in abstinence training and then train others—they received a perfect score for this approach. Heritage also proposed to conduct train-the-trainer events for faith leaders (and many other influential adults) from every county who would then reach adolescents in every county like SC PIE proposed, but Heritage did not receive a perfect score.

Heritage proposed that at these train-the-trainer events, Heritage's trained staff would provide participants with the *Sex, Lies and Hook-ups: A Parent's Guide for Fighting Back* resource. This resource, published in 2011 to be used as the Heritage Keepers' Parent Component, includes a book that provides, in lay language, the same science-based theory and methodology upon which the Heritage Keepers' program is based. This resource allows parents and other adults to effectively create behavior change in their communities using the same techniques as Heritage's own educators.

Each *Sex, Lies, and Hook-Ups* resource contains the full Heritage Keepers' curriculum for the parents to use with their teens, a book for parents about the theory and methodology of Heritage Keepers', a workbook for parents, and seven professionally produced videos/training tapes that enable parents to effectively address the "predictors" of adolescent sexual initiation. Each participant in the train-the-trainer events would receive certification as a *Sex, Lies and Hook-Ups* facilitator, which means that they provide written assurance that at least six families with teens in their communities will be provided with training in the use of the series. As a result, almost 3000 adolescents will receive the Heritage Keepers' abstinence instruction and skill-building directly from their parents/guardians who receive training from the certified faith leaders and other trained adults. Therefore, teens in EVERY county will receive the Heritage Keepers' curriculum.

In addition to training faith leaders and other influential adults in every county to reach adolescents in every county, Heritage also proposed to utilize its own trained educators to provide direct teaching to adolescents to 25 counties, 11 of which are the riskiest counties in the state. This proposal is far beyond what Heritage was able to provide last year, a substantive expansion of services that the evaluators marked down rather than up – which does not seem reasonable. The evaluators seemed to score this section with the misunderstanding that only teens in 25 counties would be receiving the Heritage Keepers' curriculum. However, as stated above, teens in every county would receive Heritage Keepers®, but Heritage would also provide additional direct services to teens in these 25 counties. These services to teens are over and above what SC PIE proposed to do since SC PIE did not plan to serve ANY students directly.

We believe it is evident that the evaluators misinterpreted the word "service" from the solicitation, therefore lowering the scoring for Heritage on all of the Evaluators Score Sheets (no.4). The evaluators appear to have scored only the direct teen services as the "county services", which is in fact a service above and beyond the train-the-trainer services that would be received by all 46 counties (as stated several times in the application). In 2011 Heritage used the same state-wide strategy and received a maximum score from all evaluators (2 of which were the same evaluators). Considering neither the solicitation nor the legislation changed, Heritage believes that the evaluators must have misinterpreted the word "services".

Exhibit: A, B, E, F, G

**Remedy:** Heritage should be given a perfect score of 20 points on the Evaluators Score Sheet (no.4) for Solicitation No. 5400004813.

4. *The extent to which a proven and public history of having effectively implemented abstinence programs in this State where participating students were at least thirty percent lower than comparable students, utilizing the process analysis as detailed under scope of Work C.*

There is insufficient and inconsistent evidence that the Healthy Image of Sex program met the legislative standard. "Entities that have a proven and public history of having implemented abstinence programs in this State may be given a preference during the contract evaluation and awarding process. For the purpose of this proviso, a program is 'effectively implemented' if the program has published positive behavioral outcomes by an independent and nationally recognized private or government agency demonstrating that a year after the program, program participants initiated sex at a rate of at least thirty percent lower than comparable non-program students." Inconsistent statistics are cited throughout the application with no documentation of source, and certainly not "independent and nationally recognized" sources. Further, there is no explanation as to which program the statistics quoted represent (SC PIE is an agency not a program) and how they were derived or who certifies them.

Exhibit: B, D

Remedy: SC PIE should be deemed unresponsive because they failed to properly document the foundational requirements of the Legislature that would ensure the program proposed has long-term significant positive behavioral outcomes for the targeted audience.

5. *Documentation showing that the program has federal Institutional Review Board (IRB) approval and is currently under IRB supervision. If Offerer does not have an approved IRB program they must provide documentation showing that they have applied for IRB approval and must provide documentation showing that the program has federal approval and is currently under IRB supervision prior to June 30, 2012*

SC PIE's IRB letter and grant submission do not match. SC PIE clearly states in the program description that students are asked behavioral questions but these behavioral questions were apparently not presented to the IRB to which SC PIE submitted its application, another serious inconsistency that may account for the SC DHEC letter stating their IRB will not supervise her project or evaluation.

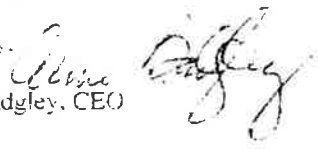
SC PIE also states they possess a Federal Wide Assurance number: FWA00003803 – this is actually the SC DHEC IRB's FWA number, not SC PIE's. SC PIE does not possess an FWA.

Remedy: SC PIE should be deemed unresponsive for the IRB requirement.

Other Issues:

The procurement officer noted in the FOIA request that they did not receive Heritage's application over the internet. In fact, the web-site to which the bid was uploaded clearly states "bid submitted," which contradicts that statement.

Overall Protest Remedy: Heritage believes that the SC PIE application was not only unresponsive to the most basic requirements of the legislation creating the funding, it also contains statements that appear to be misleading and others that copy verbiage from our previous application verbatim.

Sincerely,  
  
Anne Badgley, CEO